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No. 82-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

MOTION OF NATIONAL ASSOCIATION OF EVANGELICALS, THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND THE CHRISTIAN EDUCATORS ASSOCIATION, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The National Association of Evangelicals, the Center for Law and Religious Freedom of the Christian Legal Society, the Catholic League for Religious and Civil Rights, and the Christian Educators Association, respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the petition for a writ of *certiorari*. Petitioner has consented to the filing of a brief by *amici*, but respondent, Lubbock Civil Liberties Union, has refused to grant such consent.

Movants' interest in this case arises from their active participation in and concern for protecting the constitutional rights of students in the public education sys-

tem, particularly as those rights relate to their religious liberties. *Amici* believe that, as a result of decisions by a number of lower courts, including the decision below in this case, there is a growing perception by *amicis'* constituents that the Constitution is being interpreted in a manner hostile to religion.

The ruling of the court below fails to differentiate state-initiated and school-sponsored religious exercises from wholly student-initiated and student-run voluntary meetings with religious content. The net effect of the decision below is to denigrate religious speech on public school campuses.

The question presented in this case should be resolved quickly by this Court in order to remove the unconstitutional burden placed on religious speech by the decision below.

Movants believe that they can present a perspective on the issues raised by this case that will assist the Court in its deliberations. Thus, movants request that the Court grant their motion for leave to file the attached brief as *amici curiae* in support of the petition for a writ of *certiorari*.

Respectfully submitted,

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BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF EVANGELICALS, THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND THE CHRISTIAN EDUCATORS ASSOCIATION, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTEREST OF THE AMICI CURIAE

The *amici* are four nonprofit membership organizations having a continuing, vital interest in preserving religious liberties under the Constitution. Each of the *amici* enters this case with its own unique perspective on the issues raised.

The National Association of Evangelicals, located in Wheaton, Illinois, is a nonprofit association of evangelical Christian organizations, colleges and universities, as well as some 36,000 churches from 74 denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates. The Association brings a special expertise to this case as a result of its participation as

amicus curiae in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and its work on proposed legislation to guarantee the rights of free speech and association of students in public secondary schools which was introduced on September 17, 1982, by Senator Mark Hatfield.

The Christian Legal Society (CLS), a nonprofit, tax exempt corporation, headquartered in Oak Park, Illinois, is a voluntary membership organization consisting of more than 3,500 judges, attorneys, law professors, and law students dedicated to furthering Christian values and fellowship in the professional community. The Center for Law and Religious Freedom of CLS marshals legal skills and resources to protect the constitutional guarantees of religious freedom. The Center is closely following several cases and incidents concerning First Amendment rights of public school students to meet voluntarily on campus in meetings with religious content in Illinois, Pennsylvania, Indiana, California, South Carolina, and Washington. In the present case, the Center has established an appeal fund to help pay for the costs and fees arising out of the engagement by petitioner Lubbock Independent School District of the firm of Fulbright and Jaworski to serve as co-counsel in the preparation of petitioner's petition for a writ of *certiorari*. This was done with full knowledge and approval of petitioner.

The Catholic League for Religious and Civil Rights, a nonprofit, tax exempt California corporation headquartered in Milwaukee, Wisconsin, is a voluntary membership organization dedicated to the defense of the rights of all persons of religion and the education of the public respecting issues of religious freedom. Its membership currently stands at approximately 30,000 nationwide. Its interest and expertise in this case are in part derived from its participation as counsel in the case of

Brandon v. *Board of Education of Guilderland School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), which, although distinguishable from the present case, also raised the issue of the right of public school students to meet for religious speech and association before or after official school hours.

The Christian Educators Association (CEA), a nonprofit tax exempt California corporation headquartered in Pasadena, California, is a voluntary membership organization of public school teachers and administrators with over 23,000 members and affiliates. CEA is dedicated to ensuring quality education for public school children. Virtually all states mandate by statute that the public schools provide ethical and moral training for school children in accord with our national heritage. CEA believes that the decision by the Fifth Circuit in this case undermines these mandates and thereby diminishes the quality of education in our public schools.

SUMMARY OF ARGUMENT

The court below ignores critical distinctions between *state*-initiated and sponsored religious rituals and *student*-initiated and run meetings before or after school which have religious content. In so doing, it erroneously applies decisions of this Court concerning state-mandated and sponsored prayer and devotional Bible reading to restrict First Amendment rights of public school students, recognized and protected by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

The court below removes from public school administrators the discretion to allow collective religious expression on the school grounds before or after school.

Religious speech is thus denigrated to second class status.

If the neutrality toward religion envisioned by the Constitution is to be preserved, the decision of the court below cannot be allowed to stand.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT IN *ENGEL, SCHEMPP* AND *TREEN*, BY FAILING TO DISTINGUISH STATE-INITIATED RELIGIOUS RITUALS FROM STUDENT-INITIATED AND STUDENT-RUN MEETINGS WITH RELIGIOUS CONTENT.

In its landmark decisions concerning religious activities in public schools, this Court struck down as violations of the Establishment Clause state-initiated religious activities such as teacher-led and school-sponsored prayer and devotional Bible reading. *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). In *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), this Court affirmed that state-initiated religious exercises violated the Establishment Clause where the school directed a student volunteer to lead the classroom exercise. However, the prohibitions against state-initiated religious exercises in public schools were never intended to bar wholly *student-initiated and student-run* meetings, even though such meetings may contain religious content. As Justice Stewart noted in his dissenting opinion in *Schempp*, 374 U.S. at 318:

> [I]f such exercises were held either before or after the official school day, or if the school schedule were such that participation were merely one among a number of desirable alternatives, it could hardly be contended that the exercises did anything more than

to provide an opportunity for the voluntary expression of religious belief.

The policy adopted by petitioner Lubbock Independent School District on August 26, 1980, at issue in this case, allowing all students equal access, before or after school, for voluntary meetings with educational, ethical, moral, or religious content, is precisely the case envisioned by Justice Stewart. Moreover, the policy falls squarely within this Court's rationale in *Engel* and *Schempp*.

The Fifth Circuit's decision to ban certain meetings on campus which are wholly student-initiated and student-run solely on the basis of the religious content of the meeting violates the parameters articulated by this Court. Student-run voluntary meetings with religious content are fundamentally different from state-sponsored religious rituals in public school classrooms. Only this Court can dispel the confusion created by the court below with regard to this critical distinction.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT IN *WIDMAR* AND *TINKER* BY DENIGRATING RELIGIOUS SPEECH TO A SECOND CLASS STATUS.

The decision below cannot be reconciled with the principles articulated in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). *See also*, *Healy* v. *James*, 408 U.S. 169 (1972). *Amici* wholeheartedly adopt the discussion and application of the *Widmar* and *Tinker* holdings to this case as set forth in the petition for *certiorari* filed by Lubbock Independent School District.

In *Tinker*, 393 U.S. at 506, this Court declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Students have the right to express their opinions on controversial subjects on the school grounds so long as they do so without " 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Id.* at 511.

The Fifth Circuit ignores these First Amendment rights for public school students. It effectively denigrates religious speech to second class treatment on public school campuses. The opinion teaches public school children that speech with religious content is taboo and must be eschewed. The four judges who dissented from the denial of rehearing *en banc* recognized the tragic implications of the decision:

> We should not forget . . . that the young student may . . . be given the impression that our government and the courts and the schools are hostile to all religious belief and practice. [We] would consider that a very great wrong to the children, to the Constitution and to the nation.

Appendix D to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed November 12, 1982, at 41a (680 F.2d 424, 426).

A similar concern was expressed by this Court in *West Virginia* v. *Barnette*, 319 U.S. 624, 637 (1943):

> That they [State Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

It is imperative that the dangerous misconceptions as to the meaning of the Establishment Clause propounded by the court below be laid to rest. A denial of *certiorari* may well be perceived by school administrators across our nation as a Supreme Court mandate not to allow any voluntary student meetings containing religious speech. Indeed, incidents have already been reported to *amicus* Center for Law and Religious Freedom in which groups of two or three high school students were forbidden by school administrators to pray on the school lawn, in their parked car, or quietly by their school lockers. If the decision below is allowed to prevail it may be appropriate for public schools to advise students of their constitutional rights by posting the following sign on the schoolhouse gate:

> *ATTENTION STUDENTS:* YOUR BILL OF RIGHTS FORBIDS *ALL* VOLUNTARY RELIGIOUS SPEECH AMONG STUDENTS IN A GROUP OF TWO OR MORE ANYWHERE ON THIS CAMPUS AT ANY TIME.

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT REQUIRING NEUTRALITY BY THE STATE WITH REGARD TO RELIGIOUS ACTIVITIES.

Over the past three decades, this Court has repeatedly stressed the concept of neutrality by the state with regard to religious activities, including those of public school students.

Justice Douglas, in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), stated:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects

> the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Id. at 313-14.

Justice Clark, in *Schempp*, pointed out that the state may not establish a "religion of secularism" in the public schools. He warned that such a religion of secularism is established when the school system affirmatively opposes or exhibits hostility to religion, thus " 'preferring those who believe in no religion over those who do believe.' " 374 U.S. at 225, quoting from *Zorach* v. *Clauson*, 343 U.S. at 314.

Likewise, Justice Goldberg, concurring in *Schempp*, cautioned against an unwarranted extension of the neutrality principle:

> [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

374 U.S. at 306.

Again Chief Justice Burger, in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), reinforced the concept of *benevolent* neutrality when he wrote:

> Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 669.

Finally, Justice Blackmun, in *Roemer* v. *Board of Public Works of Maryland*, 426 U.S 736 (1976), observed:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, *but a hermetic separation of the two is an impossibility it has never required.*

Id. at 745-46. (Emphasis added.)

These concerns raised by Chief Justice Burger and Justices Douglas, Goldberg, Clark, and Blackmun were ignored by the court below with the result that benevolent neutrality has been sacrificed on the altar of hermetic separation.

CONCLUSION

For the foregoing reasons, a writ of *certiorari* should be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Court.

Respectfully submitted,

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